

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:)	Case No.: 14-51667
)	
Richard William Provence, III	)	Chapter 7
Amanda Ruth Provence)	
	)	Judge Alan M. Koschik
Debtor	)	AP No. 15-05119
)	
Marc P. Gertz, Trustee)	
)	
Plaintiff,)	
v.	)	<u>DEFENDANT'S MOTION FOR</u>
	)	<u>JUDGEMENT ON THE PLEADINGS</u>
Frisby Printing Company, dba)	
Minuteman Press)	
Defendant.)	
)	

Defendant requests this Court for an order of judgement on the pleadings in its favor dismissing Plaintiff's complaint under Rule 7012 of the Federal Rules of Bankruptcy Procedure and Rule 12(C) of the Federal Rules of Civil Procedure. Plaintiff's claim fails as a matter of law as the purported contract is unenforceable under the Statute of Frauds. The reasons for this motion are more fully set forth in the attached memorandum in support.

Respectfully submitted,

By: /s/ Jason M. Weigand
Jason M. Weigand #0081350
Nickamp, Weisensell, Mutersbaugh & Mastrantonio, LLP
23 South Main Street, Third Floor
Akron, OH 44308
Phone: (330) 434-1000
Fax: (330) 434-1001
Email: jweigand@nwm-law.com

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:)	Case No.: 14-51667
)	
Richard William Provence, III	)	Chapter 7
Amanda Ruth Provence)	
	)	Judge Alan M. Koschik
Debtor	)	AP No. 15-05119
)	
Marc P. Gertz, Trustee)	
)	
Plaintiff,)	
v.	)	<u>MEMORANDUM IN SUPPORT OF</u>
	)	<u>DEFENDANT'S MOTION FOR</u>
Frisby Printing Company, dba	)	<u>JUDGEMENT ON THE PLEADINGS</u>
Minuteman Press)	
Defendant.)	
)	

Defendant requests this Court to for an order of judgment on the pleadings in its favor dismissing Plaintiff's complaint under Rule 7012 of the Federal Rules of Bankruptcy Procedure and Rule 12(C) of the Federal Rules of Civil Procedure. A Rule 12(c) motion "is granted when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law." *Paskvan v. City of Cleveland Civil Serv. Comm'n*, 946 F.2d 1233, 1235 (6th Cir.1991).

The question of whether a document complies with the Statute of Frauds is a question of law. *Fontbank, Inc. v. CompuServe, Inc.*, 138 Ohio App.3d 801 (2000). Agreements that do not comply with the statute of frauds are unenforceable. R.C. 1335.05; *Olympic Holding Company, LLC v. Ace Limited, et al.*, 122 Ohio St.3d 89 (2009).

Plaintiff's complaint is founded upon a breach of express contract. However, assuming the Plaintiff's allegations to be true, Plaintiff's claim fails as a matter of law because the agreement fails to satisfy the status of frauds.

R.C. 1335.05 provides in part:

No action shall be brought whereby to charge the defendant... upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.

Accordingly, agreements that are not to be performed within one year from their making must be in writing and signed by the party to be charged.

Attached to Plaintiff's complaint is an unsigned copy of an alleged agreement between the debtor and the defendant. Plaintiff does not set forth allegations in the complaint that there ever was a signed agreement. Also, the unsigned agreement that is attached to Plaintiff's complaint indicates that performance by defendant was to occur over a period of 17 months (between November 2013 and March 2015). Exhibit A at §5.2. Thus, the agreement could not have been performed within one year.

WHEREFORE, Defendant respectfully requests this Court to enter judgment as a matter of law in its favor, and against Plaintiff, under Rule 7012 of the Federal Rules of Bankruptcy Procedure and Rule 12 (C) of the Federal Rules of Civil Procedure as there is no enforceable contract upon which relief could be granted.

Respectfully submitted,

By: /s/ Jason M. Weigand

Jason M. Weigand #0081350
Niekamp, Weisensell, Mutersbaugh & Mastrantonio, LLP
23 South Main Street, Third Floor
Akron, OH 44308
Phone: (330) 434-1000
Fax: (330) 434-1001
Email: jweigand@nwm-law.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendant's Motion for Judgement on the Pleadings has been served by email and regular U.S. Mail this 1st day of December 2015 upon:

Peter G. Tsarnas, Esq.
Goldman & Rosen, Ltd.
11 South Forge St.
Akron, OH 44304
ptsarnas@goldman-rosen.com

/s/ Jason M. Weigand